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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

EDISON TEXTILES, INC., Plaintiff and Appellant, v. TOPA INSURANCE COMPANY, Defendant and Respondent.	B162560 (Los Angeles County Super. Ct. No. BS 077160)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Reversed and remanded with directions.

Jeff A. Lesser, Stuart B. Esner, and Andrew N. Chang for Plaintiff and Appellant.

Janice A. Ramsay and Mark F. Marnell for Defendant and Respondent.

Plaintiff Edison Textiles, Inc. ("Edison"), timely appealed from the order confirming an appraisal award. The appraisal umpire valued Edison's lost inventory at $290,680. Plaintiff alleges that the umpire exceeded his authority by determining what was the nature of the property lost, instead of focusing on what was the value of the property lost. Plaintiff also argues that the umpire incorrectly defined "actual cash value" as "replacement cost." We reverse and remand with directions.

FACTUAL BACKGROUND

On August 27, 2000, a fire occurred on Edison's property, which completely destroyed the back of the property and all of the inventory stored there, as well as damaging the front of the property and some of the inventory stored there. Edison bought and sold fabric, trim and accessories in the secondary market. Its inventory was insured for $2 million through defendant Topa Insurance Company ("Topa"). Edison submitted a claim to Topa for a loss in excess of $1.7 million. Topa responded with a loss value of just over $200,000.

In compliance with Edison's insurance policy with Topa, the differences in the value of the loss were submitted for an appraisal proceeding pursuant to Insurance Code section 2071.[1] Edison nominated Neil Zimring and Topa nominated John S. Rickerby as appraisers. Zimring and Rickerby then selected the Honorable John Zebrowski as the umpire. The appraisal proceedings took place on August 8, August 24, and September 26, 2001, and January 15, 2002. Both sides each had two experts who testified during the hearing.

The appraisers were unable to agree on a valuation of the inventory lost. The umpire issued a detailed report valuing Edison's lost inventory at $290,680. The report

[1] Unless otherwise noted, all statutory references are to the Insurance Code.

was adopted with appraiser Rickerby concurring with the report and appraiser Zimring dissenting.

On July 12, 2002, Edison filed a petition to vacate the appraisal award. Topa filed their opposition to the petition as well as a request to confirm the appraisal award. After a hearing, the trial court issued a minute order denying the petition. The trial court did not go into any details as to the basis for its ruling, nor did it confirm the appraisal award.

Edison appealed from the denial of its petition. Topa responded by moving to dismiss the appeal on the basis that the appeal must be from an order granting a petition to confirm the award. Topa then filed such a motion. On February 3, 2003, the court confirmed the appraisal award and entered judgment. Topa and Edison then stipulated that the earlier appeal could be construed from the subsequent order confirming the award. This court then ordered that the premature notice of appeal would be construed as being taken immediately after entry of judgment.

DISCUSSION

I. The Umpire Exceeded His Authority by Deciding The Nature of Each Item[2]

Given the similarity between arbitration and appraisal enforcement proceedings (*Jefferson Ins. Co. v. Superior Court* (1970) 3 Cal.3d 398, 401), we apply to the appraisal proceeding the general standard of review applicable to arbitration, i.e., "every presumption favors the arbitrator's award." (*Safeco Ins. Co. v. Sharma* (1984) 160 Cal.App.3d 1060, 1063.)

There is, however, one significant difference between an arbitration proceeding and an appraisal proceeding. Generally an arbitration proceeding includes questions of both fact and law; thus, "the merits of the award, either on questions of law or fact, are

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[2] We find no evidence that the appellant waived the right to vacate the appraisal award by accepting the payment of the amount due under the appraisal award.

generally not subject to review." (*Ibid*.) In contrast, appraisers only have the power to determine a specific question of fact, "namely, the actual cash value of the insured [item]." (*Jefferson Ins. Co. v. Superior Court*, *supra*, 3 Cal.3d 398, 403.) "'The function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration.'" (*Safeco Ins. Co. v. Sharma*, *supra*, 160 Cal.App.3d 1060, 1063.) Therefore, the merits of an appraisal award on the value of the items lost, a question of fact, will not be reviewed upon appeal. However, this court may look to the record and other extrinsic evidence to determine what the appraisers considered the factual issue to be in order to determine if they exceeded their powers. (*Jefferson Ins. Co. v. Superior Court*, *supra*, 3 Cal.3d 398, 403.)

In pertinent part, section 2071 provides:

> "In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected. . . . The appraisers shall first select a competent and disinterested umpire . . . . The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss."[3]

Appellant contends that the umpire exceeded his powers by improperly looking into what nature or type of property comprised the lost inventory. Appellant also argues the umpire improperly looked into appellant's credibility as well as whether appellant had

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[3] At the hearing on the petition to vacate, TOPA acknowledged that the appraisal clause in Edison's insurance policy was equivalent to the clause in the standard form above.

carried its burden of proof with regards to proving what inventory was actually lost. In other words, rather than assessing the value to the inventory Edison provided as required under section 2071, the umpire exceeded his powers by making a factual determination as to what part of the inventory was residual fabric/trim and what part was bulk fabric. The record, as well as the umpire's report, support appellant's position.

Courts make a distinction between deciding the value of an item and deciding the type of the item. (*See Safeco Ins. Co. v. Sharma*, *supra*, 160 Cal.App.3d 1060, 1064.) In *Sharma*, the appraisal panel decided that a group of paintings were not a match, rather than just deciding the value of the paintings the insurer described. (*Ibid*.) In so doing, the panel decided that the insured did not actually own the paintings he claimed to have owned, or, in other words, that the type of paintings were not as the insured claimed. (*Ibid*.) The same can be said for this case.

Under section 2071, appellant had an obligation to provide the insurance company with a "complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed." There is no indication in the record as to whether appellant completely complied with this requirement.[4] Assuming arguendo the above requirement was satisfied, the only duty of the umpire was to decide the value of the items on the inventory list.

We conclude the umpire exceeded his powers by deciding how much of appellant's inventory was residual fabric and trim and how much was bulk fabric. By putting appellant's inventory into one of two categories, the umpire essentially decided the type of each item in appellant's inventory. If the respondent took issue with what the appellant claimed he lost, that issue should have been brought before a court.

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[4] Even if appellant did not comply with this requirement, and therefore the umpire did not have an accurate assessment of what was missing from appellant's inventory, the umpire did not have the power to decide what was in appellant's inventory. The only duty of the umpire is to determine the value of an item. If there is a question as to what that item is or if it exists, the issue needs to be resolved in a court.

"When an insurer disputes an insured's description in identification of the lost or destroyed property, it necessarily claims the insured *misrepresented* – whether innocently or intentionally – the character of the loss in filing a proof of loss. In turn, this claim opens the door to allegations of fraud. Were an insurer permitted to include the former issue within the scope of an appraisal, a determination in the insurer's favor would foreclose a court from determining one essential element of fraud in any subsequent litigation. Certainly, an insurer is free to litigate whether the insured has misrepresented what he lost; but it is beyond the scope of the appraisal. [Respondent] repeatedly confuses the question of *identity* of the property with those questions relating to value, e.g., *quality or condition*." (Emphasis in original.) (*Safeco Ins. Co. v. Sharma*, *supra*, 160 Cal.App.3d 1060, 1066.)

The fact that appellant deals in bulk goods is of no consequence to this case. If the appellant provided a list separating his inventory in various bulk categories, the valuation can then be accomplished with each bulk item. The umpire still cannot then put the bulk categories into different categories as he sees fit. In addition, given that the umpire exceeded his authority by deciding the type or nature of appellant's inventory, the umpire had no need to look into the credibility of appellant. Appellant's credibility only went to what the umpire believed was within each of the two categories he formed. Lastly, the only burden that was on the appellant was to provide a comprehensive list as required by section 2071. Once this was done, if there was any issue whether the items appellant claimed were lost were truly lost, that should have been raised in court.

An appraisal award may be vacated when, "[t]he [appraisers] exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (Code Civ. Proc., § 1286.2, subd. (d).) Since the umpire clearly exceeded his powers by deciding a factual issue not correctly before him, and the award cannot be corrected without affecting the merits of the decision, the court necessarily abused its discretion in granting the petition to confirm the award.

II. The Umpire Incorrectly Defined "Actual Cash Value" As Replacement Cost

The relevant portion of section 2071 provides the party is insured "to the extent of the actual cash value of the property at the time of loss, but not exceeding the . . . cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss."

"Actual cash value," as used in section 2071, is synonymous with "fair market value." (*Jefferson Ins. Co. v. Superior Court*, *supra*, 3 Cal.3d 398, 402.) However, courts have had difficulty and have been reluctant to define exactly what is meant by "fair market value." In order to give guidance to the umpire and for future appraisal proceedings, we will try to clarify the term "fair market value" as used in a commercial insurance context.

The Supreme Court determined that "fair market value" did not mean replacement cost less depreciation. (*Jefferson Ins. Co. v. Superior Court*, *supra*, 3 Cal.3d 398, 402.) The court reasoned that, "[s]ince replacement cost less depreciation can *never* exceed replacement cost, it would not be logical to interpret this clause to mean 'to the extent of the replacement cost less depreciation, but not exceeding the . . . cost to repair *or replace* the property.' If 'actual cash value' had been intended to mean replacement cost less depreciation, the Legislature would not have used 'the cost to . . . replace the property' as a limiting factor." (Emphasis in original) (*Ibid*.)

The umpire valued "fair market value" as being synonymous with replacement cost. The same reasoning in *Jefferson* can be applied here. If the Legislature intended "fair market value" to mean replacement cost, they would not have used replacement cost as a limiting factor. Replacement cost can never exceed replacement cost. "We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous." (*Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 22.) Therefore, "fair market value" must mean something other than replacement cost, replacement cost less depreciation, or repair cost.

The *Jefferson* court had already indicated that "fair market value" is the "price that a willing buyer would pay a willing seller, neither being under any compulsion to sell or buy." (*Jefferson Ins. Co. v. Superior Court*, *supra*, 3 Cal.3d 398, 402.) Appellant argues that this means the selling price. The umpire and respondent urge that the selling price would give appellant the profit he would receive on the item. However, that is why the amount cannot exceed the replacement cost of the item. Respondents argue that if appellant is given his selling price, he will receive a windfall. That is not necessarily true. Appellant may in fact receive more money in some instances if he is given replacement cost, than if he is given his selling price. For instance, say replacement cost of a set of zippers is $20. If appellant could sell those zippers for $40, the insurance policy would still limit his recovery to the $20. Now, if the market for zippers was low, and appellant could only get $15 for those same number of zippers, he would only receive the $15, and not the $20. Therefore, using the selling price as the "fair market value" standard would not give the appellant a windfall, but could actually favor the insurance company.

DISPOSITION

The judgment is reversed and remanded with directions to vacate the order confirming the arbitration award. Appellant is awarded costs on appeal.

WOODS, J.

We concur:

JOHNSON, Acting P.J. ZELON, J.